***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL

# 75-7250

To be argued By:
S. Pitkin Marshall

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In The
United States Court of Appeals
For The Second Circuit

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LAWRENCE I. WEISMAN, etc.,

Plaintiff-Appellant,

-against-

PIERRE J. LELANDAIS,, et al.,

Defendants-Appellees



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ROSEMARY T. FRANCISCUS,

Plaintiff-Appellant,

-against-

PIERRE J. LELANDAIS and SHEILA C. WEISMAN,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Southern District of New York

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BRIEF FOR APPELLEES
PIERRE J. LELANDAIS and SHEILA CLEJAN WEISMAN

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## LIST OF AUTHORITIES

## COUNTER STATEMENT OF ISSUES PRESENTED

I. Whether the District Court's orders in the cases below are final and appealable.

II Whether the court below has made error and must be reversed.

## STATEMENT OF THE CASE

The relevant prior history of these cases, to the extent that appellants' statement of the case requires amplification, is as follows:

The two cases being appealed herein are only a small part of a massive compaign of harassment which Lawrence I. Weisman ("Lawrence") has carried out during the past two years against his estranged wife, Sheila Clejan Weisman ("Clejan") her friend, Pierre LeLandais ("LeLandais") her attorneys, and her business associates. The record herein contains a slight reference to the multiple lawsuits which have arisen out of Lawrence's campaign (A. 42). The several suits have been brought by Lawrence in the State Courts of New York, the State Courts of Maryland, and the District Court for the Southern District of New York. The suits apparently arise out of the Weisman divorce proceedings, disputes raised therein, and a series of incidents which took place in 1972.

In 1974, LeLandais and Clejan sought to put an end to all this harassing litigation by bringing actions in this Court to enjoin all further lawsuits. Those related actions (LeLandais v. Weisman, 74 Civ. 2953 CES; and Sheila Clejan Weisman v. Weisman, 74 Civ. 2952 CES) resulted in a temporary Restraining Order signed on July 18, 1974

and a subsequent Order dated September 11, 1974, enjoining all of the parties involved (Lawrence Weisman; Sheila Clejan Weisman; Rosemary Franciscus; and Pierre LeLandais) from commencing any further action against one another in any State or Federal Court anywhere.

Coincidently with their efforts to enjoin further litigation, LeLandais and Clejan moved below in these two present related cases (74 Civ. 3145 CES; and 74 Civ. 3146 CES) to dismiss the actions (a) for failure to state a claim, (b) for lack of in personam jurisdiction and (c) on the ground that the actions are frivolous and not brought in good faith (A. 37; 46).

In further evidence of the harassment tactics and bad faith of this whole litigation, reference is made to the manner in which defendants, Clejan, Eugene Leytess, Nicholas Doman and Sheila Kahoe were brought into this case as defendants and then some of them were dismissed out. In short, this action was originally brought by Lawrence alone against LeLandais alone in the Eastern District of New York. On July 12, 1974, that Court ordered the case to be transferred to the Southern District of New York. Thereupon, Lawrence amended his complaint presuming to act on behalf of three additional members of his family

as plaintiffs and joining his estranged wife (Clejan) and her attorneys (Doman and Kahoe) along with Leytess (step-father of LeLandais) as additional defendants. In the motion to dismiss on behalf of all defendants, Kahoe and Doman argued that they had nothing to do with the acts complained of and in fact had not even met Clejan when the acts complained of took place. In fact, Doman stated that Lawrence had admitted that his action against Doman and Kahoe was brought for the ulterior purpose of forcing a marital settlement with his estranged wife, Clejan (A. 44). Recently, apparently persuaded by his new attorney that has claims against Doman and Kahoe were ridiculous on their face, Lawrence stipulated to discontinue this action against Doman and Kahoe (A. 3).

This appeal was originally brought for the purpose of reversing the trial court's order. Now, however, having discovered that the Ninth Circuit makes a distinction between dismissal of an action and dismissal of a complaint, the appellant is seeking an order dismissing the appeal and remanding the case to the District Court with leave to replead. In short, this plaintiff wishes to keep litigating. He does not care whether he litigates in the District Court or in this Court or by motion, by trial or by appellate

brief. Rather than follow through with this appeal and risk an affirmance which would end this litigation, Lawrence now seeks to go back to the District Court and start again.

The appellees, on the other hand, urgently request that at least this particular segment of Lawrence's broad litigation campaign be terminated permanently.

## POINT I

## THE ORDERS BELOW ARE FINAL AND APPEALABLE

1. Appellant's Ninth Circuit Cases are Inapplicable.

The appellants build their argument for dismissal of this appeal on a technical distinction which has apparently been made by the Ninth Circuit, but which this Circuit has never recognized. No authority at all exists in this Circuit for the proposition that dismissal of a "complaint" is a non final, non appealable order under 28 U.S.C. §1291. Although the question apparently has not been squarely confronted, it seems to be assumed in this Circuit that dismissal of an action and dismissal of a complaint mean exactly the same thing; that is, a final dismissal on the merits which is appealable.

For example, in Korn v. Franchard Corporation, 443 F.2d 1301 (2d Cir. 1971) this Court stated that if the Court below had dismissed both the class suit "and the complaint itself," each judgment clearly would have been final and appealable as if right under 28 U.S.C. §1291.

There can be little doubt that Judge Stewart assumed and intended that his dismissal of the "complaint" was indistinguishable from a dismissal of the action and

was final and appealable. The motions to dismiss in behalf of LeLandais were made on the dual grounds that the complaint failed to state a claim and that it was frivolous and in bad faith. (The other defendants moved also on jurisdictional grounds. Since the motions were granted as to LeLandais as well as the others, it must be assumed that at least the two grounds of failure to state a claim and bad faith were the basis for the dismissal.)

In granting the motion as to LeLandais, Judge Stewart could have been finding either (1) that the complaint failed to state the claims it purported to state, but perhaps adequately stated some other cause or causes of action, or (2) that the complaint failed to state a claim of any kind. Had he found the former, Judge Stewart most certainly would have dismissed with specific leave to amend. There can be no doubt that Judge Stewart made a determination below that no claim of any kind was stated in the complaint. In this Circuit, such a finding is final and appealable regardless of whether the "case" is dismissed or the "action" is dismissed or the "complaint" is dismissed.

Secondly, since Judge Stewart was the same judge

before whom LeLandais and Clejan made their motion to enjoin all further lawsuits against them by these plaintiffs, and since Judge Stewart signed such an injunction (LeLandais v. Weisman, 74 Civ. 2953 CES; Sheila C. Weisman v. Weisman, 74 Civ. 2952 CES) he was fully aware of the litigious nature of these plaintiffs and he was well situated to make a determination that the instant cases were frivolous and brought in bad faith.

2. Even Under the Ninth Circuit's Line of Cases, the "Finality Rule" Should Be Applied Here.

Even the Ninth Circuit has recognized that in some "special circumstances," a finality rule should be applied when a "complaint" rather than an "action" has been dismissed below. The rule is well stated in Marshall v. Saywer, 301 F.2d 639 (9th Cir. 1962) at p. 643:

> The special circumstances which will permit this court to regard such an order as final and appealable must be such as to make it clear that the court determined that the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling plaintiff to assume that he had no choice but to stand on his complaint.(citations omitted)

Such special circumstances are present in this case. First, as is set forth above, there is much reason to think that Lawrence is using this Court (and several

other courts) in bad faith to carry out a campaign of harassment against his estranged wife and her friend, LeLandais. The Court below was asked to make a determination that these cases were frivolous and in bad faith. The Court apparently made such a determination. That alone should constitute such special circumstances so that this Court should apply its own "finality rule" to this particular situation regardless of whether or not it adopts the Ninth Circuit's interpretation of 28 U.S.C. §1291.

Second, as is discussed in Point II herein, these plaintiffs' complaints cannot possibly be amended to state a federal claim under the Civil Rights Act.

## POINT II

### THE COMPLAINTS HEREIN DO NOT AND CANNOT STATE FEDERAL CLAIMS

Appellants have purported to "plead basically a 42 U.S.C. Sec. 1983 civil rights complaint" (Appellants brief, p. 11). Several other "Counts" have been included in the complaint but are apparently conceded by appellants to insufficiently state federal claims. For example, Counts I and II appear to be, if anything, common law actions for conversion of property and for violation of fiduciary responsibility. They certainly do not state claims under the Securities Act of 1933 or the Securities Exchange Act of 1934. Count III appears to be alleging common law libel. It states no federal claim at all. The statutes cited in Count IV, 28 U.S.C. §§ 876, 1951, and 1952(b), do not exist. Counts V through XIX appear to relate to the purported civil rights claim.

In order to state a claim for damages under the Civil Rights Act, the conduct complainedof must be engaged in under color of state law. Such a cause of action does not lie against a private person who is acting in his individual capacity. Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031 (1944).

There seems to be no doubt that a federal civil rights action can be brought against a police officer who in his official capacity is alleged to have made an unconstitutional arrest. The statute, however, does not give a remedy against a private individual for the tort of false arrest. In their brief on this appeal, the appellants make the blithe statement that, "A private person who obtains an arrest complaint seeks a judicial remedy and thus performs state action within the meaning of 42 U.S.C. Sec. 1983." Not a single case is cited to support the proposition. No case can be cited for the law is contrary.

For example, in Perkins v. Rich, 204 F.Supp. 98 (D. Del. 1962), an inspector of police who had been annoyed by plaintiff's harassing phone call in the middle of the night when he was at home in bed later went to the police station and made a formal complaint like any private citizen. Plaintiff's arrest and trial were carried out by other officials. The court dismissed a federal civil rights action against the inspector, stating that his actions in signing an arrest warrant were purely private in nature and without any official character or color.

There is even less "color of state law" in the

present case. Neither LeLandais nor Clejan has any connection at all with any law enforcement or other state official. No such connection is alleged. All of the acts of defendants alleged in the lengthy complaint are the acts of private citizens acting as such.

Finally, it should be noted that the appellants here have made no attempt at all to suggest how their complaint could be amended to state a claim. It seems clear that no such amendment can be made as to the allegations stated. If plaintiff's intend to make entirely new allegations, they are certainly free to bring a separate action.

CONCLUSION

For the reasons stated herein, these cases should not be remanded to the trial court with leave to amend the pleadings. The dismissals below must be affirmed and the actions dismissed.

Respectfully submitted,

SCHWENKE & DEVINE
Attorneys for Defendants-
Appellees, LeLandais and
Sheila Weisman

Of Counsel:

S. Pitkin Marshall

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Appellees Brief

IS HEREBY ADMITTED.

DATED:

Nov. 24- G Mills

Attorney for